IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Shiv Dutt Charan v. State of Rajasthan & Ors.

S.B.CIVIL WRIT PETITION NO.4933/2003
under Article 226 of the Constitution of India.

Date of Order : 22nd August, 2005

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. S.N.Trivedi, for the petitioner.
Mr. Sangeet Lodha, for the respondents.

BY THE COURT :

By this writ application a challenge is given by the petitioner to the validity of sub-rule(4) of Rule 18 of the Rajasthan Commercial Taxes Service Rules, 1971 (hereinafter referred to as “the Rules of 1971”). The petitioner has also sought a direction to consider his candidature for the purpose of promotion to the post of Assistant Commercial Taxes Officer (hereinafter referred to as “ACTO”) strictly in accordance with the criteria of seniority-cum-merit against the vacancies pertaining to the year 1988-89. The challenge is also given to the order dated

29.3.1989 passed by Dy. Secretary to the Government of Rajasthan under the orders of His Excellency the Governor giving promotions to 20 persons as ACTO in substantive capacity in accordance with the Rules of 1971. The petitioner has also challenged validity of the communication dated 20.3.1999 whereby the Dy. Commissioner (Administration) Headquarters, Department of Commercial Taxes, Jaipur communicated to the petitioner that there was no illegality in the order dated 8.5.1989 while giving promotion to 20 persons as ACTO under the criteria of seniority-cum-merit and merit at the ratio of 1:1.

The factual matrix giving rise to present petition is as follows:-

The petitioner, a member of Rajasthan Commercial Taxes Subordinate Service (General Branch) entered in the services being appointed as Commercial Taxes Inspector Gr.II by an order dated 12.11.1974 as a consequence of his regular selection. By an order dated 30.5.1981 the petitioner was confirmed as Commercial Taxes Inspector Gr.II w.e.f. 1.3.1980 and was promoted as ACTO purely on adhoc basis under an order dated 4.10.1987. By an order dated 29.3.1989 promotions were given to 20 Commercial Taxes Inspectors Gr.II as ACTO in accordance with the Rules of 1971. Out of 20 persons promoted under the order referred above 10 persons were promoted purely on

basis of criteria of merit and 10 were promoted under the criteria of seniority-cum-merit.

The petitioner being aggrieved by order dated 29.3.1989 preferred a writ petition before this Court (SBCWP No.3777/89, Shiv Dutt Charan v. State of Rajasthan & Ors.) with an allegation that he was superseded by the respondents while making promotion to the post of ACTO erroneously. The writ petition preferred by the petitioner was disposed of by this Court vide judgment dated 15.4.1998 with a direction to the Commissioner, Commercial Taxes, Rajasthan, Jaipur to consider the notice for demand of justice submitted by the petitioner and to take just and proper decision with regard to the grievance raised by him in accordance with law. In compliance of the directions given by this Court by judgment dated 15.4.1998 by communication dated 20.3.1999 it was communicated to the petitioner that the promotion to the post of ACTO under the order dated 8.5.1989 were given against existing 20 vacancies on basis of seniority-cum-merit and merit at the ratio of 1:1 and service record of the petitioner was not found excellent/very good, therefore, no error was committed by the departmental promotion committee while not recommending his candidature for promotion.

The petitioner being aggrieved by communication dated 20.3.1999 and the order dated

8.5.1989 again approached this Court by way of filing a writ petition bearing SBCWP No.3338/99. The aforesaid writ petition by an order dated 6.3.2000 was transferred to Rajasthan Civil Services Appellate Tribunal for its adjudication. The tribunal treated the same as an appeal under Rajasthan Civil Services (Service Matter) Appellate Tribunal Act, 1976 (hereinafter referred to as "the Act of 1976") and numbered the same as H241/2000. The appeal above was withdrawn by the petitioner with liberty to file a fresh petition on 27.8.2003. According to the petitioner he withdrew the appeal with view to challenge validity of sub-rule(4) of Rule 18 of the Rules of 1971, hence this writ petition is preferred.

The petitioner though in prayer clause of the writ petition has given challenge to proviso to sub-rule(4) of Rule 18 of the Rules of 1971 but at the outset it is stated by counsel for the petitioner that in fact mentioning of proviso in prayer clause of the petitioner is an error, in fact the petitioner intend to challenge validity of sub-rule(4) of Rule 18 of the Rules of 1971. In view of the statement given by counsel for petitioner at Bar validity of sub-rule(4) of Rule 18 of the Rules of 1971 is examined by the Court while adjudicating present petition.

The Rules of 1971 were framed by Governor of Rajasthan exercising powers conferred by proviso to

Article 309 of the Constitution of India regulating recruitment to the posts in and the conditions of service of persons appointed to the Rajasthan Commercial Taxes Service. The lowest post under the Rules of 1971 is the post of ACTO. The entry No.5 in Schedule-I to the Rules of 1971 provides source of recruitment to the post from which promotion to the post of ACTO can be made minimum qualification for direct recruitment and qualification and experience for the promotion to the post referred above. Clause (5) of Schedule appended with the Rules of 1971 reads as under:-

x”5”	@Assistant Commercial Taxes Officer.	50% by promotion and 50% by direct recruitment.	A Graduate in Science, Arts, Commerce or Agriculture from a recognised University established by law in India or a qualification recognised by Government as equivalent thereto in Consultation with the Commission, a Chartered Accountant will also be eligible for direct recruitment.	Commercial Taxes Inspectors.	Five years' experience on the post mentioned in Col.5 & must have passed the Qualifying Examination given in Schedule-II.	Service against the posts of Sales Tax Inspector, or Inspector, Excise & Taxation shall count in computing the period of 5 years.

The Rajasthan Commercial Taxes Subordinate Service (General Branch) Rules, 1975 (hereinafter referred to as “the Rules of 1975”) regulates recruitment to the post in and conditions of service of persons appointed to Rajasthan Commercial Taxes Subordinate Service (General Branch). The Rajasthan

Commercial Taxes Subordinate Service consists of two posts, those are, Commercial Taxes Inspectors Gr.I and Commercial Taxes Inspectors Gr.II. It is stated at Bar that in fact there is no cadre of Commercial Taxes Inspector Gr.I as prescribed under the Rules of 1971 exists.

Be that as it may, the Commercial Taxes Inspectors irrespective of their gread are having an avenue for promotion to the post of ACTO under the Rules of 1971. Part-I of the Rules of 1971 prescribes procedure for recruitment to the post of ACTO by promotion and for appointment to other higher posts by way of promotion. Rule 18 of the Rules of 1971 provides criteria, eligibility and procedure for promotion to junior, senior and other posts encadred in Rajasthan Commercial Taxes Service. Sub-rule(4) of Rule 18 of the Rules of 1971 provides that selection for promotion in regular line of promotion from the post/posts not included in service to the lowest post or category of posts in service shall be made strictly on basis of merit and on basis of seniority-cum-merit in the proportion of 50:50. Sub-rule(4) of Rule 18 of the Rules of 1971 reads as under:-

> “(4)Selection for promotion in the regular line of promotion from the post/posts not included in Service to the lowest post or category of post in the Service shall be made strictly on the basis of merit and on

> the basis of seniority-cum-merit in the proportion of 50:50.
>
> Provided that if the Committee is satisfied that suitable persons are not available for selection by promotion strictly on the basis of merit in a particular year, selection by promotion on the basis of seniority-cum-merit may be made in the same manner as specified in these Rules."

The contention of counsel for the petitioner is that sub-rule(4) of Rule 18 of the Rules of 1971 is bad being not in conformity with the provisions of sub-rule(5) of Rule 18 of the said Rules. Sub-rule(5) of Rule 18 of the Rules of 1971 reads as under:-

> "(5)Subject to the provisions of sub-rule(7), selection for promotion from the lowest post or category of post in the State Service to the next higher post or category of post in the State Service and for for all posts in the Subordinate Service and in the Ministerial Services shall be made strictly on the basis of seniority-cum-merit from amongst the persons who have passed the qualifying examination, if any, prescribed under these Rules, and have put in at least five years' service, unless a different period is prescribed elsewhere in these Rules, on the first day of the month of April of the year of selection on the post or category of post from which selection is to be made:
>
> Provided that in the event of non-availability of the persons with the

> requisite period of Service of five years, the Committee may consider the persons having less than the prescribed period of service, if they fulfil the qualifications and other conditions for promotion prescribed elsewhere in these Rules, and are found otherwise suitable for promotion on the basis of seniority-cum-merit."

It is contended by counsel for the petitioner that the post of ACTO is the lowest post in service and promotion to it from the post of Commercial Taxes Inspectors is first promotion, therefore, in accordance with sub-rule(5) of Rule 18 of the Rules of 1971 the same is required to be filled in by way of promotion strictly on basis of seniority-cum-merit. No promotion on the post of ACTO can be permitted to be made on the basis of criteria of merit. It is also contended by counsel for the petitioner that even according to general principle first promotion is required to be made either on basis of seniority or seniority-cum-merit, therefore, sub-rule(4) of Rule 18 of the Rules of 1971 which permits the respondents to make promotion on basis of merit is arbitrary.

The petitioner while giving challenge to the order dated 29.3.1989 has urged that even if it is accepted that the respondents rightly made promotions on basis of criteria of merit the order of promotion is bad as the vacancies reserved for Scheduled Castes and Scheduled Tribes were filled in on basis of

seniority-cum-merit alone. The respondents should have filled in the reserved vacancies on basis of criteria of seniority-cum-merit and merit in equal ratio.

Heard counsel for the parties.

The challenge to sub-rule(4) of Rule 18 of the Rules of 1971 is given by the petitioner on the count that the same is not in conformity with sub-rule (5) of Rule 18 of the said Rules. In my considered opinion the contention raised by the petitioner is frivolous and misconceived. Sub-rule(4) of Rule 18 of the Rules of 1971 relates to a promotion to Rajasthan Commercial Taxes Service created under the said Rules to a lowest post of it on basis of merit and seniority-cum-merit in equal ratio. The promotion to a lowest post in service is required to be made from the post of Commercial Taxes Inspectors which is a cadre under the Rules of 1975, as such the appointment by way of promotion provided under sub-rule(4) of Rule 18 of the Rules of 1971 relates to the promotion from Rajasthan Commercial Subordinate Service, a different service to the Rajasthan Commercial Taxes Service. On the other hand, sub-rule(5) of Rule 18 of the Rules of 1971 relates to promotion within the Rajasthan Commercial Taxes Service. In view of it, these two provisions are having absolutely different field of operation and totally independent. Sub-rule(5) of Rule 18 of the Rules of 1971 is nothing to do with

promotions made from a post created under the Rules of 1975 to a post created under the Rules of 1971.

It is also contended by counsel for the petitioner that adoption of the criteria of merit in first promotion is arbitrary and on that count too sub-rule(4) of Rule 18 of the Rules of 1971 is bad and, therefore, the same deserves to be declared ultravires to Article 14 of the Constitution of India. Counsel for the petitioner in fact utterly failed to point out any arbitrariness in sub-rule(4) of Rule 18 of the Rules of 1971. The legislature under the Rules of 1971 provided two methods of recruitment to the post of ACTO i.e. 50% vacancies of the posts concerned are required to be filled in by way of direct recruitment and remaining 50% by way of promotion. The criteria of merit for promotion is a known and well established criteria in service jurisprudence. Same is also required to maintain efficiency in service. The prescription of criteria of merit while making promotion even at first step cannot be said arbitrary or a colourable piece of legislation. Validity of provision being unconstitutional can be challenged on number of grounds, such as, (i) contravention of any fundamental right specified in part-III of the Constitution; (ii)legislation of a provision beyond competence; (iii)contravention of any of mandatory provisions of Constitution which impose limitations upon the powers of a legislature, and (iv)

the legislature has made an excessive delegation of legislative function to some other body. None of above grounds is available in present case to challenge the validity of sub-rule(4) of Rule 18 of the Rules of 1971. The provision impugned is also not a colourable piece of legislation, as such the challenge to sub-rule(4) of Rule 18 of the Rules of 1971 is misconceived, frivolous and totally unwarranted.

The contention of counsel for the petitioner that by order dated 29.3.1989 the vacancies sought to be filled in by way of promotion through the criteria of seniority-cum-merit have been wrongly assigned to the members of Scheduled Casts and Scheduled Tribes cannot be adjudicated and examined in present petition as no person belonging to those categories has been included as party respondent to proceedings. In absence of persons vitally effected no relief as prayed by the petitioner can be granted.

In view of whatever discussed above, the writ petition is devoid of merit. The same, therefore, is dismissed.

(GOVIND MATHUR),J.

kkm/ps.